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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 80

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

RHODES PHARMACAL COMPANY, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MEMORANDUM IN REJOINDER TO PETITIONER'S MEMORANDUM IN REPLY.

FRANK E. GETTLEMAN,
ARTHUR GETTLEMAN,
EDWARD BRODKEY,
Attorneys for Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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The Federal Trade Commission admits that the Court of Appeals had the power to modify the Commission's cease and desist order, including the remedy, even if it agreed with the Commission's findings. (Memo in Reply, p. 2.) It contends only that the particular modification made in this case was improper, since it not only eliminated the ambiguity of petitioner's order, but, it is claimed, "substantially alter[ed] the measure of the relief which the Commission had found necessary to protect the public against respondents' misrepresentations." (*Ibid.*) This contention is without merit, for two reasons: first there was

no substantial change in the order; and second, necessary modifications in substance are proper.

It is true that "The Commission * * [wa]s of the opinion that the inclusion of the word 'temporary' as used in the order * * [wa]s *necessary* and proper in all respects" (R. 965), while the Court, on the contrary, found "that the protection of the public *does not require* petitioners to use the word 'temporary' * *". (R. 979.) [Emphasis supplied.] But that is not a prohibited substitution of judgment. As pointed out in our Brief in Opposition, the remedy selected by the Commission must have a "reasonable relation to the unlawful practices found to exist," *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612. (Br. in Opp. p. 16.) Such reasonable relation must include a showing of the necessity of the order in question, which must not be unduly drastic, harsh or burdensome. *Ibid.*, pp. 612-613. (Br. in Opp. p. 17.)

In its Opinion, the Commission states:

> "Respondents raise two objections to the use of the word 'temporary' in the hearing examiner's order. One, that it is unnecessary, and two, that it is uncertain in its meaning. The Commission is of the opinion that advertising claims should *always* be so limited where only temporary relief is afforded unless by the very nature of the claim, there is no danger of deception. The danger of deception in this case lies particularly in the fact that respondents desire to represent that their preparation will afford *relief from pains due to a particular cause*, namely, pains of arthritis and rheumatism. *By limiting the type of pain relief claimed, respondents imply that a lasting relief will be achieved* by eliminating the cause of the pain. * * * The Commission, *therefore*, is of the opinion that the inclusion of the word 'temporary' * * is necessary * *." [Emphasis supplied.] (R. 964-965.)

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The courts of appeal for both the Seventh and the District of Columbia Circuits have decided that the term "temporary" is uncertain and ambiguous. (Br. in Opp. pp. 21-22.) In so doing, both courts have, in a sense, substituted their judgment for that of the Commission, but only to test the reasonableness of the Commission's action. So too, in our case, the Court of Appeals eliminated "temporary" from the Commission's order only to make it reasonable.

The Commission's original order was not reasonable or necessary. It is submitted that it does not follow, as recited in the above excerpt from the Commission's Opinion, that a claim to relief of the pain of a particular condition, such as arthritis, imports more lasting relief than a claim to pain relief generally, or that the use of the word "temporary" in a cease and desist order is "therefore" required.

And as pointed out in our Brief in Opposition (Br. in Opp. pp. 18-20), the Commission's order, as modified by the court below, sufficiently preserves the Commission's justifiable intent to protect the public, and is not a substitution of the Court's judgment for that of the Commission within the meaning of the applicable decisions. Paragraph 1(c) of the order, as modified (R. 980), will prohibit respondents' claiming that "Imdrin" will stop swelling or stiff joints. To the extent that the modified order does not require respondents to specify that "Imdrin" will relieve only "minor" pains, it will, of course, permit them, should they so desire, to claim that the preparation will in some way affect "severe" pains. If this is a substitution of the Court's judgment for that of the Commission, it is a permissible one. If it curtails the scope of the Commission's order to deny it the use of an admittedly indefinite (R. 965) term such as "temporary" or "severe," Congress contemplated such curtailment.

Petitioner admits that the Court can change its order. It does not specify in what respect the Court may do so. We agree that the Commission's order may not be modified unless it is arbitrary, capricious or unreasonable or constitutes an abuse of discretion. But if it is subject to such criticism, it would be interesting to know what, if anything, the Commission believes Congress intended to authorize the Court of Appeals to do with that order. Anything the Court would do by way of modification, to correct the order in the light of its disagreement with the Commission, would be a necessary substitution of its judgment for that of the agency. Does the Commission think the Congressional authority to modify contained in Section 45(c) of the Act is empty rhetoric?

The Commission admits that the courts of appeal have power to re-write the Commission's cease and desist orders to correct formal defects, such as to clarify an ambiguity of terms (Petitioner's Memo in Reply, p. 2), or to provide a less drastic remedy (*Ibid.* p. 3), but insists that such power does not extend to making modifications of a substantive nature. We disagree. Neither the express language of the statute, 15 U. S. C. § 45(c), nor the decisions of the courts so limit the power to modify.

In *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218, this Court specified the respect in which it expected the Commission's order to be changed and remanded with directions to permit the respondents to continue to use their trade name, subject to qualifications. In *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613-614, the Court said it was "left in the dark" whether a less drastic order would suffice and was "not ready to pass on the question whether the limits of discretion have been exceeded in the choice of the remedy until the administrative determination is first made." In both cases, it was the use of the trade name which the

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Commission claimed was deceptive. If the misleading character of the trade name was alone enough basis for the Commission's order to cease using it, there would have been no cause for this Court reviewing the case. By doing so, this Court clearly showed that there were other considerations to be taken into account, despite the Commission's insistence that "If the Commission's orders are to possess any vitality, the restraint must be complete and unqualified * *." (Br. in Opp. pp. 17-18.) This is obviously a proper and contemplated substitution of the judgment of the courts for that of the Commission, as to the remedy.

But petitioner suggests that these cases are distinguishable from that at bar. It says that, in the cases cited, this Court was concerned only with whether there was a remedy less drastic than that selected by the Commission to correct the misrepresentations, whereas here the question is whether the Court can "modify the order so as to permit continuation of those very misrepresentations." Petitioner misses the point. The determination of whether a less drastic remedy will suffice to protect the public may well entail rejection of one capriciously proposed by the Commission, although definitely intended. The courts need not effectuate the Commission's intent in the choice of a remedy under all conditions. Consequently, the cases are not distinguishable in principle.

Petitioner implies that unless the court's modification provides what the Commission regards as an adequate substitute for the Commission's ill-chosen remedy, the modification, insofar as it eliminates any prohibition of the Commission, may not stand. We do not think this Court would permit any cease and desist order to stand just because it would eliminate unlawful practice, or strike as insufficient any judicial modification thereof just because it did not guarantee complete and unqualified restraint.

In many cases decided by the courts of appeal, cease and desist orders were modified even though the modifications restricted the scope of the Commission's intended prohibitions. Many of these resulted from substantive disagreements between the courts and the Commission. *E. g. Etablissements Rigaud, Inc., et al.* v. *Federal Trade Commission,* 2 Cir., 1942, 125 F. 2d 590, and many of the cases cited in Brief for Respondents in Opposition, pp. 13-14, footnote 6. These decisions clearly went beyond a determination of whether or not a less drastic order would suffice to effectuate the Commission's intended prohibitions. They decided that the Commission's intent was improper.

We do not mean to express agreement with the action of the Court in *Dolcin Corporation, et al.* v. *Federal Trade Commission,* D. C. Cir., July 1, 1954, No. 11,700 [reprinted in Brief for Respondents in Opposition, p. 25]. We cited the case only as authority for the proposition that a court of appeals other than that for the Seventh Circuit agreed that the language of the Commission's order in this case was ambiguous and needed correction. The Court said it was modifying the *Dolcin* order "in accordance with its intended meaning." We disagree with petitioner's suggestion that "the modifications made by the Court in the *Dolcin* case * * do not change the substance of the order, * *." We submit that the Commission intended to impose the prohibitions expressed in its order, not just those implicit in its findings. So the Court properly disagreed, in substance, with the Commission's chosen remedy.

The fact that courts of appeal may modify Commission orders differently, on review, should not override Congress' intent that they have such power. Uniformity may be too dearly purchased. Congress intended unreviewable administrative expertise to extend only to factual determinations of a technical nature and not to those which the courts were equally qualified to make, such as the effect

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of an advertisement on the public. The question of a proper remedy is only "initially and primarily for the Commission." When "the administrative determination is * * made," [as here], the courts are "ready to pass on the question * * of discretion." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612, 614. Here, the Commission had already considered and rejected the possibility of an order not containing the word "temporary." The reasonableness of that decision, as well as the ambiguity of the order was before the Court of Appeals, which decided that so drastic an order was not required to protect the public. The Court's modification was proper and should stand.

Respectfully submitted,

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August 25, 1954.